

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

KMS TECH, INC., : Docket #20-cv-01041  
Plaintiff, :  
-against- :  
G MISSION, INC., et al., : New York, New York  
November 28, 2023  
Defendants.

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PROCEEDINGS BEFORE  
THE HONORABLE VALERIE FIGUEREDO  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1                   THE DEPUTY CLERK: KMS Tech, Inc. versus  
2 G Mission, Inc., et al., Case Number 20-cv-1041.  
3 The Honorable Valerie Figueiredo presiding.

4                   Counsels, can you please make your  
5 appearances for the record, starting with  
6 plaintiff's counsel.

7                   MS. MELEKOU: Good morning. This is  
8 Eleni Melekou -- go ahead.

9                   MR. SHERMAN: Todd Sherman and  
10 Eleni Melekou on behalf of the plaintiff. Thank  
11 you.

12                  MR. ROSS: Good morning, Your Honor. This  
13 is Maurice Ross on behalf of the defendants and  
14 counterclaim plaintiffs. And my associate,  
15 Barack Bacharach will handle this hearing, he is on  
16 the line with us.

17                  MR. BACHARACH: Good morning, Your Honor.  
18 This is Barack Bacharach.

19                  THE COURT: Good morning, everyone. This  
20 is Judge Figueiredo.

21                  So I gather the parties wanted to have a  
22 conference to discuss potentially the scope of what  
23 the joint expert was going to be addressing or the  
24 discovery schedule. So I'm happy to have anyone who  
25 wants to start off go ahead with what you'd like to

1 discuss.

2 MR. BACHARACH: Your Honor, this is  
3 Barack Bacharach for the defendants.

4 So I think the parties wanted to discuss  
5 the scope of two issues. As you mentioned  
6 correctly, yes, we would like to discuss the scope  
7 of the expert comparison. Now, I believe, since our  
8 last status conference, it's plaintiff's expert.  
9 It's no longer a joint expert. And secondly, we'd  
10 like to discuss what costs plaintiff is to  
11 compensate defendants for that were mooted by  
12 plaintiff's late introduction of the deposit.

13 And, really, we're here because plaintiff's  
14 counsel has just been not reasonable in pursuing  
15 this action throughout this whole entirety, that's  
16 why it's been delayed so long. And this is a  
17 pattern that's continued. It's clear what the scope  
18 of the expert comparison was to be. And plaintiff  
19 presented -- and defendants generally offered  
20 plaintiff to inspect their premises and come and  
21 inspect the machine and have -- and provide the  
22 expert with any passwords he might need to access  
23 it. Plaintiff presented an unreasonable list of  
24 demands, including a technical support person to  
25 essentially do the expert's job for him, as well as

1 for defendants to cover the cost of shipping the  
2 machine from their own premises to the expert's  
3 office.

4 And on top of that, when defendants asked  
5 plaintiff to re-compensate them for the reasonable  
6 attorney's fees that were mooted by their late  
7 instruction of the deposit, plaintiff only agreed to  
8 pay \$1,400, less than 5 percent of the fees that  
9 were incurred, and a facially ridiculous amount.

10 So it's been very hard because really the  
11 demands that plaintiff is placing on defendants is  
12 unreasonable. It's plaintiff's burden to prove this  
13 case. It's plaintiff's burden for their expert --  
14 to incur the cost of the expert. And plaintiffs  
15 have to compensate defendants for the costs they  
16 incurred that were mooted by their behavior. And  
17 they just won't do it.

18 THE COURT: Sorry. Can we just take a step  
19 back? Because I'm not entirely following. And,  
20 again, correct me if my recollection is wrong. I  
21 thought the issue of cost had to do with the cost of  
22 briefing that portion of the summary judgment motion  
23 that defendants had incurred prior to the reopening  
24 of fact discovery.

25 MR. BACHARACH: Yes. And plaintiffs have

1 only agreed to compensate a minute -- a tiny amount  
2 of those costs.

3 THE COURT: Okay. So that seems to me like  
4 a separate issue from the expert.

5 MR. BACHARACH: Yes, it is a separate  
6 issue.

7 THE COURT: Okay. So maybe we can just  
8 take one issue at a time. Specifically, what's the  
9 issue with regards to the expert?

10 MR. BACHARACH: The issue with regards to  
11 the expert is, it was always our understanding -- it  
12 was always defendant's understanding, and I believe  
13 it was everyone's understanding, that the necessity  
14 of this expert -- let's go back. Let's do the  
15 timeline a little bit, right?

16 Plaintiffs sold defendants the software,  
17 the PlayBox software in 2015, but they didn't  
18 register the copyright until 2019. Moreover,  
19 plaintiffs didn't keep records of their software.  
20 And at deposition, the software engineer who  
21 designed the software for plaintiffs admitted it was  
22 updated multiple times, right?

23 So the fundamental issue with plaintiff's  
24 case and why they want to introduce the certified  
25 deposit was that plaintiff could not prove that they

1 sold defendants a copy of the software that was  
2 copyrighted. And the reason they couldn't do it  
3 with accessing the machine that they sold to  
4 defendants is because they lost the record of what  
5 they actually sold to defendants.

6 It was always our understanding that the  
7 relevant expert comparison would be between the  
8 certified deposit showing what was copyrighted, as  
9 well as -- and compared that to the version of the  
10 PlayBox that plaintiffs sold defendants. That is  
11 what we offered plaintiff's expert to come and  
12 inspect on our premises, is what our understanding  
13 the comparison was to be. And instead, plaintiff  
14 demanded access to every single copy of the software  
15 that defendants may have made, including copies that  
16 were put on other machines and modified in certain  
17 ways, even though defendants have long admitted to  
18 copying those. And, also, a bunch of other  
19 unreasonable demands on defendants, like a dedicated  
20 technical support person to essentially do the  
21 expert's job for him.

22 So we're just kind of at an impasse as to  
23 what the scope of this comparison should be and what  
24 defendants --

25 THE COURT: So it sounds like, as I

1 understand it, there was the certified copy on  
2 deposit 2019. There's the version of the PlayBox  
3 software that was sold to you in 2015. And  
4 defendants have since made copies of that software.

5 MR. BACHARACH: Yes, but I should say the  
6 copies -- so it's important to understand this  
7 for -- it's important to understand something about  
8 the copies. The copies are not exactly direct  
9 copies. Defendants always bought the PlayBox  
10 software as a backup, and the reason they bought it  
11 was because it had access to foreign language songs  
12 that defendants otherwise didn't have. And it was  
13 always going to be integrated with the defendant's  
14 larger main system. It was a secondary system.

15 So defendants made some copies of the  
16 software, but they made the copies to integrate it  
17 with certain other machines. So in making those,  
18 quote/unquote, copies, what they really did is, they  
19 took certain elements of the PlayBox software and  
20 they put it in other machines. And those elements  
21 are discordant. They are not whole. They might --  
22 probably don't match the certified deposit. And,  
23 again, defendants have long admitted to making these  
24 copies. So we just don't understand what  
25 defendants -- or why plaintiffs want access to these

1 copies, what the point of the comparison is. We're  
2 willing --

3 THE COURT: Let me just ask, the copies you  
4 made would have been of the 2015 software.

5 MR. BACHARACH: Would have been of the --  
6 yes.

7 THE COURT: So maybe I'm missing something.  
8 But if they inspect the 2015 software, it sounds  
9 like what you copied were pieces of that. So that's  
10 what you would see in whatever other iteration you  
11 might have this software in, but it would still  
12 fundamentally be pieces of the 2015 software.

13 MR. BACHARACH: Yes.

14 THE COURT: Okay. I'm happy to hear from  
15 anyone, Ms. Melekou or Mr. Sherman, on just this  
16 issue of what the expert is going to be comparing or  
17 evaluating.

18 MR. SHERMAN: Thank you, Your Honor. This  
19 is Todd Sherman.

20 That was overly complicated. A lot of the,  
21 quote/unquote, demands that were referenced are  
22 really looted by meet and confers that occurred that  
23 were not referenced. And they weren't demands.  
24 They were issues that were thought to be needed to  
25 make things more efficient. However, the real issue

1 is, what are the plaintiffs permitted to inspect?

2 What we want to do, and what our expert has  
3 told us that is necessary, is to have him go to the  
4 defendant's facility, examine the PlayBox that was  
5 sold to the defendant and also examine the copies  
6 that they admit they made, because the question is,  
7 were these copies true copies? Are they infringing  
8 or are they not infringing? That's ultimately the  
9 legal question that will have to be answered.

10 They acknowledge copying. But then in the  
11 explanation that was just provided to the Court,  
12 there was a lot of characterizations that we don't  
13 know to be accurate. And I'm not suggesting for a  
14 second that counsel is misrepresenting anything.  
15 I'm saying that his client may be; we don't know.  
16 And there's an allegation of copyright infringement.  
17 The expert needs to inspect the software to  
18 determine whether or not it is, in fact, infringing.  
19 And there's an expert analysis, a fact analysis.  
20 There's a legal analysis. And what we've been told,  
21 no -- and it's been a hard no -- to is, doing an  
22 inspection of the copied software.

23 Now, Your Honor, as we review the  
24 transcripts of the prior conferences/hearings, that  
25 address this issue, authorized what is now the

1 plaintiff's expert to inspect the defendant's  
2 software. And the defendant's software is the  
3 copies. And we're not being given access to that.  
4 And we don't believe it's an unreasonable request.

5 In terms of the technical support, I  
6 believe that what that was really narrowed down to  
7 was, if we need a password to get into the system,  
8 please don't make us have to hack in. If there's a  
9 password, just give it to us. And, of course, if  
10 you want somebody there while our expert, who you  
11 vetted and approved, is there doing their work, of  
12 course you can observe them because it's your  
13 facility. But all the other issues that were raised  
14 in terms of technical support were mooted by  
15 discussions that happened weeks ago, and they're no  
16 longer an issue.

17 So the only issue right now is, can the  
18 plaintiff please inspect the software that we  
19 believe to have been infringed so that we can make  
20 the proper analysis and come forth to the Court as  
21 we need to. That's all we want to do with respect  
22 to the software, is copy -- excuse me, is make  
23 copies of, as is appropriate for the expert's use,  
24 of course, of what's in the Play- -- inspect the  
25 PlayBox, copy what's in the PlayBox, inspect the

1 copies, copies -- duplicate the copies, do whatever  
2 inspection that a software expert does, and report  
3 to us and the Court, as appropriate, what the  
4 findings are. And we --

5 MR. BACHARACH: So --

6 MR. SHERMAN: -- all unreasonable.

7 MR. BACHARACH: I would just like to make a  
8 very brief point in response.

9 So we also reviewed the transcript and it  
10 very specifically said -- at least we believe the  
11 Courts very specifically say the copy, singular,  
12 that the expert could inspect, the copy, singular,  
13 that plaintiffs sold to defendants.

14 Also, this is what -- I think there's the  
15 fundamental disconnect here. We thought that it was  
16 agreed upon that the fatal flaw in plaintiff's  
17 infringement theory that the deposit was supposed to  
18 correct was whether or not they initially sold  
19 defendant's copyrighted software. Defendants have  
20 long admitted to copying that software. Now, we say  
21 it's with the license. However, if the software  
22 that defendants -- that plaintiffs sold defendants  
23 is indeed covered by deposit, there is no, sort of,  
24 issue that then copying that, if it was a license,  
25 would be infringed. That's not the legal issue, at

1           least as we see it, or we thought everyone saw it.

2           So we always thought that the relevant  
3 comparison was between, again, what was sold to  
4 defendants and the certified deposit. And I still  
5 have yet to hear a rationale for why, since we've  
6 admitted to copying it, plaintiff's expert needs to  
7 inspect the copies, right? If they can prove that  
8 the certified deposit covers what they sold, that's  
9 the end of the infringement equally, correct?

10 Unless I'm mistaken.

11           MS. MELEKOU: Your Honor, Eleni Melekou  
12 here.

13           Defendants have already admitted that they  
14 copied, but this happened more than a year ago, and  
15 here we are now again. And if we don't have access  
16 to the copy of the defendant, we will find ourselves  
17 in the same position, in the same place, in a few  
18 months from now.

19           So what plaintiff has to prove is whether  
20 the allegedly infringing software is similar to the  
21 copyrighted software. And this is what the case law  
22 show us, that the analysis and the comparison is  
23 between the allegedly infringing software and the  
24 copyrighted software. And, again, if we don't have  
25 access to the copy, then in a few months from now,

1 let's say in February, once the expert discovery is  
2 concluded, defendants might present an argument that  
3 somehow the transfer of the software caused the  
4 software to be different, so defendants used an  
5 entirely different software. So we will find  
6 ourselves in the same place as we are now.

7 MR. ROSS: Your Honor, this is

8 Maurice Ross.

9 The problem with this situation is it  
10 ignores the history. The history of this matter is  
11 that, after the deposition, an agreement was  
12 reached. We admitted that copies were made of the  
13 software; they were not exact copies. The copies  
14 were manipulated so that they would stitch together  
15 with other software. So the copies, we already know  
16 they don't match the original software.

17 But putting that to the side, there was a  
18 stipulation that no more discovery would be  
19 necessary. And remember, what happened here is the  
20 plaintiff delayed for months providing the deposit.  
21 In fact, we made the summary judgment motion  
22 because, at that time, they hadn't produced the  
23 deposit. The Court allowed them to reopen discovery  
24 for the limited purpose of allowing them to conduct  
25 a comparison between the original software in the

1 PlayBox and the deposit. The Court never allowed  
2 them to reopen discovery so they could go into our  
3 offices and obtain copies of every copy that was  
4 ever made. And the copies really don't exist as  
5 pure copies. They were all stitched together. And  
6 what they want to do is reopen discovery way beyond  
7 what the Court contemplated and essentially require  
8 us to give them all of the copies.

9 We acknowledge that all they need to do to  
10 prove infringement is to prove that the original  
11 software in the original PlayBox matches the deposit  
12 and it's substantially similar to the deposit. Once  
13 they prove that, then they prove an infringement.  
14 And then the question simply is whether the  
15 defendant had the right to make the copies pursuant  
16 to the license. But for them to engage in this new  
17 round of discovery and ask to see all, whatever,  
18 20 copies were made and to inspect all of them, it's  
19 way beyond the scope of anything that the Court  
20 contemplated. It really complicates this matter.

21 This should be very simple. The only  
22 comparison that is necessary to prove infringement  
23 is between the software in the original PlayBox and  
24 the deposit. Nothing more is required to prove  
25 infringement. We admit that we made copies. We say

1 we had the right to make the copies.

2 And understand, defendant's counsel  
3 agreed -- there was a stipulation long ago that,  
4 because defendant agreed that we made copies, the  
5 only remaining issue was whether the original  
6 software matched the deposit. That's the problem  
7 here. And what they're trying to do is just reopen  
8 discovery full-fledged. We think it's improper.

9 THE COURT: Can I just ask a question?  
10 Because it sounds together -- at various points,  
11 people have said defendants made copies. But then  
12 at other times, it seems like it's not actually a  
13 copy. It's something that was, and I'm quoting, I  
14 thought someone said stitched together with other  
15 software. So it sounds --

16 MR. ROSS: That's right. And that's a very  
17 key point, Your Honor. This is Maurice -- that's a  
18 very key point.

19 You have to understand the concept here was  
20 to use the software in the PlayBox, but it had to be  
21 combined to fit in our other system. The PlayBox  
22 was not the major system used in the facility.  
23 There was another system that is the main system,  
24 and it had its own software. But the PlayBox  
25 software integrated certain access to foreign songs.

1                   So what would happen is, the two softwares  
2 would essentially be manipulated and stitched  
3 together. So the copies that exist are not -- they  
4 will have pieces of the PlayBox software, but  
5 they've been manipulated to the point where it may  
6 be misleading to conduct a comparison. The only  
7 real solid, clear comparison is between the original  
8 software and the deposit.

9                   THE COURT: And when was the  
10 stitched-together software put together?

11                  MR. ROSS: Well, over the years. I mean,  
12 see, understand -- what happened here is, PlayBox  
13 was purchased for the purpose of having access to  
14 these foreign songs that were not available in the  
15 preexisting system. So what would happen is, the  
16 client would take the software from the PlayBox and  
17 integrate it into other computer systems. And in  
18 order to do that, you take that software and it  
19 becomes integrated or stitched into the system with  
20 other software. I have no doubt that portions of  
21 the software in the copies may map the deposit.  
22 They may. But it's going to be very complicated to  
23 compare those copies with the deposit, and it's  
24 going to create all kinds of complicated, different  
25 issues on the issue of infringement.

1                   The infringement issue should be very  
2 straightforward. If the deposit matches the  
3 original software in the original PlayBox, then  
4 we've stipulated that the copies infringe. We're  
5 not disputing that, okay? So it's a red herring to  
6 say they need to get into all the copies. Our  
7 position on the copies has simply been we were  
8 entitled to make them. It was part of the license  
9 agreement that we received. But we're not disputing  
10 that the copies infringe. And, therefore, the only  
11 necessary comparison is between the original  
12 software and the deposit.

13                  THE COURT: And I'm just thinking through  
14 this out loud, but why aren't they able to argue  
15 that potentially the copies infringe what's  
16 registered in 2019? Because your admission is that  
17 it would have infringed whatever software was sold  
18 to you in 2015. But it sounds like, potentially,  
19 they could make a different argument as to  
20 infringement.

21                  MR. BACHARACH: Well, Your Honor, that, in  
22 our mind, would be the point of -- sorry. This is  
23 Barack Bacharach for defendants.

24                  Your Honor, that would be the point of  
25 comparing the software that plaintiffs sold to

1 defendant in 2015 with the certified deposit. That  
2 is the link that would establish infringement, if  
3 you will. Because if the software that plaintiff  
4 sold defendants in 2015 is covered by the deposit,  
5 if that is indeed copyrighted, then defendants have  
6 long admitted that the --

7 THE COURT: I think my question is slightly  
8 different, right? It sounds like you made these  
9 copies over time. So maybe the 2019 registered  
10 copyrighted version of the software doesn't match  
11 what was given to you in 2015.

12 But why don't they have a separate argument  
13 that the copies that you made between 2015 and later  
14 could potentially infringe what was registered in  
15 2019?

16 MR. BACHARACH: Because those copies would  
17 be pieces of what was sold to defendants in 2015.  
18 So it's the same. Those copies would be more far  
19 removed from -- if the software that was sold -- if  
20 the software that was sold to defendants in 2015  
21 doesn't match up with the copy in 2019, then ipso  
22 facto copies that are more far removed from that  
23 software and even less similar to what was  
24 registered are infringing, right? Those copies are  
25 still pieces of what was sold to defendants in 2015.

1                   MR. SHERMAN: Your Honor, most  
2 respectfully -- this is Todd Sherman on behalf of  
3 the plaintiff.

4                   We're hearing a lot of what appears to be  
5 factual contentions that have never been  
6 established. So that is one of the main reasons why  
7 we need to inspect these copies because we're being  
8 told there's a copy. There's a copy. Part of it's  
9 a copy. There's a connection to a copy. But what  
10 really is it? And without having the opportunity  
11 for our expert, who, again, they vetted and  
12 approved, inspect the software, we're at a loss.

13                  And this isn't reopening discovery. It's  
14 an issue that's been open and being addressed since  
15 the introduction of the certified deposit. So  
16 nothing that we're requesting is unreasonable or out  
17 of the ordinary for a copyright infringement case.  
18 We're not hearing a stipulation that each and every  
19 one of our copies is an infringement. "There is no  
20 need for you to inspect because we admit infringing  
21 your software." We're not hearing that. We hear  
22 that there's a copy, and then we're hearing that  
23 there's fragments, pieces, or things that are tied  
24 together.

25                  Now, if this is all, in fact, true, it may

1 very well be an infringement. I am very confident  
2 that there will be an argument to the contrary. And  
3 that's why we needed an inspection and an analysis  
4 to be able to come forward and also to confront any  
5 such argument. And, again, this isn't like we're  
6 trying to go and publish their information to the  
7 entire free world. We're looking to inspect and  
8 analyze for the purpose of this litigation. So  
9 there really should be no -- this shouldn't even be  
10 an issue. There's a copy; we're alleging that it  
11 was improperly made. They're alleging that it  
12 wasn't. They're alleging that we're contending that  
13 there's no infringement; we're contending that there  
14 is. The evidence of the infringement is the copies  
15 in addition to -- there's a chain. There's what was  
16 created, what was sold, what was copied, and how it  
17 was used. And all of those things are elements of  
18 the infringement claim. And it's not unreasonable  
19 for the plaintiff to want to conduct the inspection  
20 that we've requested and we believe was already  
21 authorized. It's that disagreement that brings us  
22 before you today.

23 MR. ROSS: Your Honor, this is  
24 Maurice Ross.

25 Very respectfully -- very respectfully,

1 Counsel makes reasonable points, except for one  
2 problem -- two problems. We're not dealing with  
3 this problem in a vacuum. This case goes back to  
4 2019. What they're trying to do now is something  
5 that they could have done years ago. But, at one  
6 point, there was an agreement they didn't need to  
7 see the copies. We admitted that if the original  
8 software that they provide to us infringes, the  
9 copies infringe, okay?

10 Now, they say they have to look at the  
11 copies. I don't know how it could be more clear.  
12 We will admit that, if the original software in the  
13 PlayBox infringes, matches the deposit, the copies  
14 are infringing. Now, we believe we have the right  
15 to infringe. But you see, the problem here is  
16 also --

17 THE COURT: This is, I guess, what I'm not  
18 following is why -- it sounds like you would admit  
19 that the copies infringe if the original software  
20 infringes. And I was asking earlier, why can't they  
21 say -- or why can't they make an argument that even  
22 if the original software doesn't infringe, the  
23 copies themselves could infringe?

24 MR. ROSS: Because, Your Honor, they're not  
25 real copies, first of all. They're going to be

1       stitched together with other software. It's a  
2       problem; they could make that argument. The  
3       copies -- we're not going to have magically -- if  
4       the original software didn't infringe, we're not  
5       going to somehow create on our own copies that  
6       magically infringe. I mean, that's just not  
7       realistic.

8                   THE COURT: No, but there's other ways to  
9       infringe the copyright that's not a literal copy if  
10      it's substantially similar.

11                  MR. ROSS: Well, I understand that,  
12       Your Honor, but this is just -- would be allowing  
13       them to reopen discovery. They stipulated years ago  
14       that they didn't need this discovery. And the  
15       disruptions in my client's business, if we have to  
16       give them access to all of these copies, is  
17       substantial, and we're at a point where this is just  
18       not fair. It's unreasonable.

19                  Frankly, the Court should never have given  
20       them the opportunity, after they missed many  
21       deadlines, to even conduct this comparison. It was  
22       very generous of the Court to allow them to reopen  
23       discovery to conduct this very limited comparison  
24       between the original software. And to allow them to  
25       now reopen this whole mess, I think it's

1 fundamentally unfair to my client.

2 THE COURT: So, Mr. Ross, two things. One  
3 is how many copies are we talking about? Because  
4 you're making this argument that there's a burden,  
5 but there's no specifics being provided.

6 MR. ROSS: I don't know the exact number,  
7 but they had 18 rooms and they used the PlayBox in  
8 many of the rooms. So you can presume it's 6 feet  
9 or 8 feet. There's a number of copies.

10 And we're admitting that we copied it, that  
11 we copied -- that we used elements of their  
12 software.

13 THE COURT: And then just one more  
14 question. You had said earlier that they had  
15 stipulated or that there had been some agreement  
16 that led defendants to stipulate to the copying.

17 Is that somewhere on the docket?

18 MR. ROSS: No, Your Honor. That was an  
19 agreement that occurred with Gregory Nahas and  
20 myself after the depositions, wherein their  
21 witnesses admitted that they had updated the  
22 software on multiple occasions and so forth. And we  
23 admitted that we made copies and that the copies --  
24 that if the original software matches the  
25 copyrighted deposit, that those copies infringe.

1 And I'll admit that on the record today.

2 MR. BACHARACH: I believe it's memorialized  
3 in the emails as well.

4 MR. SHERMAN: Your Honor, this is  
5 Todd Sherman.

6 A look at the record doesn't reveal any  
7 such a stipulation. What it does show is that,  
8 during the deposition testimony, I believe, of a  
9 representative of the defendants, that there was an  
10 interjection by Mr. Ross where he asserted that the  
11 software was copied. I don't even believe it's  
12 testimony from the defendant himself. I'm not sure  
13 if it was because of a language barrier because I do  
14 believe that the deposition may have been conducted  
15 in a foreign language. I'm not 100 percent sure.  
16 My recollection isn't that clear.

17 But it is my recollection that Mr. Ross had  
18 interjected that it was copied. We admit it was  
19 copied. But that's not a stipulation, and it's  
20 certainly not an agreement to not investigate or not  
21 assess.

22 And, again, now we're hearing that there is  
23 all these different uses of our client's software  
24 and there's mentions of a license agreement that we  
25 also don't agree is in the record or exists with

1 these vast terms. So there's a lot of factual  
2 issues that are being argued now by defendant's  
3 counsel that go very well to the heart of why  
4 inspecting the copies, whether in whole or in part,  
5 because it seems like there was manipulation done to  
6 our client's software, which itself may be an  
7 infringement that we're being blocked or attempted  
8 to be blocked from seeing.

9 And our request, again, we just  
10 respectfully submit that it's not unreasonable to  
11 want to see the software that we allege to have been  
12 infringing.

13 THE COURT: Okay. And I know the  
14 parties -- I don't want to run out of time, but I  
15 know the parties have said there was a second issue  
16 that they want to discuss.

17 MR. SHERMAN: Yes, Your Honor. This is  
18 Todd Sherman again, for the record.

19 It goes to the amount of compensable costs  
20 associated with the drafting of the defendant's  
21 summary judgment motion because a particular issue  
22 was, in fact, mooted by the Court's acceptance of  
23 the certified deposit that was, in fact, filed late.  
24 And we acknowledge that.

25 And during the last hearing before

1 Your Honor, we addressed the Rule 16 authority of  
2 the Court, and we acknowledged that the Court had  
3 discretion, and what it did in exercise of that  
4 discretion was assess costs on the limited issue to  
5 the plaintiff. And we acknowledged that. And I  
6 believe that resolved our motion for  
7 reconsideration. And I think that that's what the  
8 whole point of that conference was.

9 There's a dispute as to what the costs  
10 associated with that motion and that particular  
11 prong of the motion are compensable. And we did, in  
12 fact, receive invoices from defendant's counsel.  
13 Ultimately, they were unredacted, not getting into  
14 details, because we agreed to keep it attorney's  
15 eyes. And so I know that this record itself is  
16 public. So I'm not going into any detail for that.  
17 But we disagree as to -- solely, of course, on the  
18 invoice. A hearing could expand on it. But based  
19 upon the invoice, of the entries on the invoice, we  
20 disagree that a vast majority of what is being  
21 attributed -- distinct portion of a motion -- and  
22 the directive Your Honor had ordered because we  
23 disagree that this vast array of costs would be  
24 associated with -- again, on the face of the trans-  
25 -- and yes, we did discuss this at length with both

1       Mr. Ross and Mr. Bacharach. We had extensive  
2       discussions in meet and confer sessions, trying to  
3       nail it out. And, unfortunately, it's a very  
4       fact-specific inquiry.

5           And on the papers below of just the  
6       invoices, we cannot come to an agreement. Yes, the  
7       number that we propose, based upon a review, I  
8       believe -- and this is just based upon notes that I  
9       had taken several weeks or months ago -- was \$1,140.  
10      I know that the defendants disagree. I'm not saying  
11     that to be offensive. I'm saying it to just be  
12     clear to Your Honor, that that's what we computed  
13     based upon our view of the invoices. And it wasn't  
14     in an attempt to do anything but interpret what we  
15     were seeing and come up with a number that we  
16     believed was taking the invoices at face value, not  
17     questioning the veracity of anything. These dollar  
18     figures appear to be associated fairly with that  
19     particular argument and briefing that particular  
20     argument, and that's where that number came from.

21           MR. BACHARACH: Your Honor, I fundamentally  
22     dispute what Mr. Sherman said. Sorry. This is  
23     Barack Bacharach for defendants.

24           So I can get into a little bit more factual  
25     detail than what Mr. Sherman mentioned. Defendants

1 incurred about \$40,000 in expenses preparing this  
2 motion. Defendants requested only half, \$20,000.  
3 And we thought that was eminently reasonable and, in  
4 fact, fair because the majority of this work was  
5 spent on the issue of the lack of the deposit,  
6 right?

7 The other issue, the fact that plaintiffs  
8 sold defendants software for music that they  
9 evidently did not have licenses to, is a discrete  
10 and simple legal issue. It required no factual  
11 background. It required very little factual  
12 background. It required very little research on  
13 case law. It's a simple matter of applying the  
14 doctrine of unclean hands and copyright to misuse.

15 Now, the other issue, the fact that  
16 plaintiff instituted this action without any records  
17 of their own software or the copyrighted deposit  
18 itself, that is a very factually detailed issue and  
19 also a legally, sort of, far-out-there issue, right?  
20 It's not very often that you find cases that  
21 requires a lot of the development of case and that  
22 requires a lot of review of case law. It requires a  
23 development of a law of factual background.

24 And plaintiff took the position that only  
25 one quarter of the time spent drafting the brief was

1 compensable. They took the position that not only  
2 was not the legal research required for making the  
3 argument about the certified deposit, the factual  
4 background -- long, detailed factual background  
5 required, all the time spent reviewing the documents  
6 to figure out what happened, why this delay  
7 happened, what their misconduct was. Not only is  
8 that not compensable, plaintiffs took a position  
9 that the actual drafting of the factual background  
10 that explains this whole long pattern of delay and  
11 refusal to provide the deposit, they took position  
12 that that itself was not compensable, even though  
13 defendants only asked for half of those costs,  
14 right?

15 We could have asked for all that, in  
16 fairness, because that had nothing to do with the  
17 fact that, in 2015, they sold our client software  
18 for music they didn't have a license to. We could  
19 have asked for all the cost of that; we only asked  
20 for half. And they still took the position that  
21 none of that was compensable. So I really dispute  
22 that this was a good faith effort to look at bills  
23 and to figure out what was --

24 MR. SHERMAN: Your Honor, again, this is  
25 Todd Sherman.

1           I apologize. But Your Honor directed that  
2 the costs that were compensable were solely  
3 associated with drafting the particular argument of  
4 their brief that dealt with the delay in filing the  
5 certified deposit. The other arguments are wholly  
6 unrelated. And so those costs could never have been  
7 compensable under Your Honor --

8           MR. BACHARACH: So --

9           MR. SHERMAN: -- and the factual  
10 background, to the extent that it's a statement of  
11 facts in a brief, they would have had to do a  
12 statement of wealth. They could have elected to do  
13 a statement of facts in any summary judgment brief.  
14 The odds on the defendants, in this particular case,  
15 not renewing a motion for summary judgment, because  
16 I believe they were granted leave to at the end of  
17 this expert assessment, is very low. There's no  
18 doubt that they will, in fact, bring about that  
19 motion and use the very same statement of fact as  
20 they did in whatever other prior arguments that  
21 they've already briefed.

22           So we look to what was fairly attributable  
23 based on the invoices to this particular discrete  
24 argument. And while Counsel may disagree, it was a  
25 good faith effort on our part to parse out what is

1 totally related to that particular issue. And,  
2 again, while there's a lot of adjectives being used,  
3 this was four pages of the brief, not --

4 MR. BACHARACH: Respectfully, the Court  
5 said that it was --

6 MR. SHERMAN: Sir, sir, sir --

7 MR. BACHARACH: Sorry. I thought you were  
8 done.

9 THE COURT: I'm just going to interject a  
10 minute --

11 MR. SHERMAN: For expediency, I'm done,  
12 Your Honor. Thank you very much.

13 THE COURT: Yeah, no worries. I'd have to  
14 see briefing on this. I'm not going to be able to  
15 resolve this on this call.

16 So on the attorney's fees issue, defendants  
17 can file a motion. I'm happy to give you a briefing  
18 schedule on that. I don't think -- you can make it  
19 a full-blown motion if you think it's necessary.  
20 You could do a letter motion, something shorter.  
21 I'd leave that up to you. If the parties want to  
22 work out a briefing schedule, that's also fine. If  
23 not, I can set one now.

24 MR. SHERMAN: On behalf of the plaintiff,  
25 we're more than happy to speak with the defendants

1 about what works in terms of a briefing schedule and  
2 report to Your Honor, if that's acceptable. On the  
3 other hand, if they prefer that Your Honor set it,  
4 then we understand that as well. But we're happy to  
5 speak with them and work something out that's  
6 amenable to everyone if that's acceptable to the  
7 Court.

8 THE COURT: Yeah. I mean, I think it's  
9 generally best for the parties to work out a  
10 schedule that works for them, and I'm happy to memo  
11 endorse it.

12 Mr. Ross, did you want to say something?

13 MR. ROSS: Yeah. Given the difficulties in  
14 working with plaintiff's counsel, I normally would  
15 agree with that, but -- well, why don't we try it.  
16 If we can't work out a briefing schedule, we'll  
17 report to the Court.

18 THE COURT: Okay. Why don't you give it a  
19 shot. Again, I'm fairly flexible here, so you could  
20 take as much time as you need. And this is  
21 definitely something that would require briefing.

22 On the other issue, I think I've definitely  
23 heard from everyone. I just want to look back at  
24 the docket for a few things. I will issue an order  
25 relatively quickly addressing the expert discovery

1 issue. I just want to ask one more question on  
2 that.

3 I don't recall what happened or if we ever  
4 addressed this at the last hearing. But on the  
5 joint expert, is that a cost that's borne only by  
6 plaintiff?

7 MR. SHERMAN: Your Honor, the expert is no  
8 longer joint. It was determined that it would be  
9 plaintiff's expert. Very same person that was  
10 vetted. And yes, it's a plaintiff's-only cost.

11 THE COURT: Okay.

12 MR. ROSS: Your Honor, both of these  
13 issues, to me, I mean, fundamentally, there's a  
14 whole history here, and plaintiffs are attempting to  
15 simply pretend that the case is starting from  
16 scratch. And I just think both on this attorney's  
17 fee issue, and they really -- they're part of the  
18 same problem, which is that defendants have been  
19 caught up into this litigation for years. It's as  
20 if the plaintiffs are trying to start from scratch  
21 and take no responsibility for their delays. And  
22 it's very frustrating and unfair to my client.

23 MR. SHERMAN: Your Honor, on behalf of the  
24 plaintiff -- and, again, this is Todd Sherman -- if  
25 the defendants would have just given us the access

1 we asked for, this hearing, if anything, would have  
2 been reporting to you what our expert found. So any  
3 delay now is certainly not the plaintiff.

4 We're trying to get access just so we can  
5 do what we need to do. The fact that we're being  
6 thwarted is why we're here. So we would like to  
7 move forward expeditiously. We would like to have  
8 had our expert in there making the assessment that  
9 we believe to be necessary, so that way we could  
10 move forward. And we were told no, and that's why  
11 we're here.

12 THE COURT: All right. So then, again,  
13 I'll give you a decision on that relatively quickly.

14 On the attorney's fees issue, if the  
15 parties want to decide exactly how robust the  
16 briefing you want to make and the time period. If  
17 you can't reach an agreement, just send me a letter,  
18 and I can give you a schedule.

19 MR. SHERMAN: Thank you very much,  
20 Your Honor. It's most appreciated.

21 MR. BACHARACH: Thank you, Your Honor.

22 MR. ROSS: Thank you, Your Honor.

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1                   C E R T I F I C A T E

2  
3                   I, Marissa Mignano, certify that the foregoing  
4 transcript of proceedings in the case of  
5 KMS TECH, INC. v. G MISSION INC, ET AL, Docket  
6 #1:20-cv-01041-GBD-VF, was  
7 prepared using digital transcription software and is  
8 a true and accurate record of the proceedings.

9

10

11 Signature Marissa Mignano  
12                   Marissa Mignano

13

14 Date:           December 12, 2023

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